



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

**MEMORANDUM**

SUBJECT: Approval of Mille Lacs Band of Ojibwe's Application for Eligibility for Two Programs under the Clean Air Act Tribal Authority Rule

FROM:   
Edward Nam, Acting Director  
Air and Radiation Division

  
T. Leverett Nelson, Regional Counsel  
Office of Regional Counsel

  
Anthony Greenwater, Director  
Tribal and International Affairs Office

TO: Robert A. Kaplan  
Acting Regional Administrator

The Mille Lacs Band of Ojibwe (the Tribe) submitted an application for eligibility for two non-regulatory programs under the Clean Air Act Tribal Authority Rule: 1) authority for eligibility for funding at a reduced match under Clean Air Act (CAA) Section 105, and 2) for the right to be notified and provide comments on Title V air operating permits as an "affected state" under CAA Section 505(a)(2). Staff in the Air and Radiation Division, Office of Regional Counsel, and Tribal and International Affairs Office have reviewed the Tribe's application and found that it meets the approval requirements of the CAA and the Tribal Authority Rule (TAR), set out at Section 301(d) and 40 C.F.R. § 49.6, and we are recommending that you approve the Tribe's request.

On September 8, 2015, EPA determined that the Tribe's application was complete and notified the State of Minnesota of the start of the 30 day comment period and its opportunity to review and comment on the Tribe's assertion of jurisdiction over its trust lands as enumerated in its TAR application. EPA also published newspaper notices to apprise the public of its opportunity to provide relevant comments on the Tribe's application for 30 days. The state and public comment period ended on November 23, 2015. EPA addressed all relevant comments in the attached support document, which also contains our analysis of the Tribe's application and how it satisfies the eligibility criteria for these two CAA programs under the Tribal Authority Rule.

We recommend that you concur with our approval recommendation and sign the attached letters to the Mille Lacs Band Chief Executive Melanie Benjamin and Mille Lacs County Attorney Randy V. Thompson notifying the Tribe and State of EPA's decision.

Attachments

**Concurrence**

I concur that the Mille Lacs Band of Ojibwe's application for authority to receive eligibility for funding at a reduced match under CAA Section 105 and for treatment as a state under CAA Sections 505(a)(2) contains all the elements necessary for EPA to approve the Tribe's requests.

  
Robert A. Kaplan

Acting Regional Administrator

12/7/16  
Date

**Non-Concurrence**

I do not concur that the Mille Lacs Band of Ojibwe's application for authority to receive eligibility for funding at a reduced match under CAA Section 105 and for treatment as a state under CAA Sections 505(a)(2) contains all the elements necessary for EPA to approve the Tribe's requests.

\_\_\_\_\_  
Robert A. Kaplan  
Acting Regional Administrator

\_\_\_\_\_  
Date

**Support Document for the Approval of the Mille Lacs Band of Ojibwe's Request for  
Eligibility for Two Clean Air Act Programs under the Tribal Authority Rule  
Prepared by the Air and Radiation Division, Office of Regional Counsel, and Tribal and  
International Affairs Office**

**November 23, 2016**

The Mille Lacs Band of Ojibwe (the Tribe) applied for eligibility for two non-regulatory programs under the Clean Air Act (CAA) Tribal Authority Rule (TAR): 1) authority for eligibility for funding at a reduced match under CAA Section 105, and; 2) for the right to be notified and provide comments on Title V air operating permits as an "affected state" under CAA Section 505(a)(2). Staff in the Air and Radiation Division, Office of Regional Counsel, and Tribal and International Affairs Office have reviewed the Tribe's application and found that it meets the approval requirements of the CAA and the TAR, set out at Section 301(d) and 40 C.F.R. 49.6. The following analysis details our review of the Tribe's application and how it meets these eligibility criteria and forms the basis for our recommendation to approve the Tribe's request.

**Eligibility Requirements**

The U.S. Environmental Protection Agency published the Air Quality Planning and Management Rule for Indian Tribes Final Rule (Tribal Authority Rule or TAR) on February 12, 1998, which sets out the regulations for implementing CAA authorities with respect to tribes. The TAR authorizes the Administrator to treat an Indian tribe in the same manner as a state for the CAA provisions identified in 40 C.F.R. § 49.3 if the Indian tribe meets the following criteria:

- (a) The applicant is an Indian tribe recognized by the Secretary of the Interior;
- (b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;
- (c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction; and,
- (d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations.

**Eligibility Review**

The following evaluation demonstrates that the Tribe has met the eligibility criteria for the CAA authorities that are the subject of the application.

**1. Federal Recognition (40 C.F.R. 49.7(a)(1))**

The Mille Lacs Band of Ojibwe is listed as a federally recognized tribe on the register published by the U.S. Department of the Interior, Bureau of Indian Affairs, "Indian Entities Recognized

and Eligible to Receive Services from the Bureau of Indian Affairs,” 81 *Federal Register* 26826, 26828 (May 4, 2016) (Exhibit A)).

## **2. Substantial Governmental Duties and Powers (40 C.F.R. 49.7(a)(2))**

The Tribe has submitted the following information that describes the framework of its government:

- Tribal Governmental Authorities: The Tribe’s government is divided into three branches: legislative, executive, and judicial. The executive branch administers the laws of the Tribe, conducts inter-governmental relations, negotiates and executes contracts on behalf of the Tribe, and administers the Tribe’s budget and contracts. The Band Assembly is the legislative branch of the Tribe’s government. This body enacts laws and regulates the Tribe’s affairs, including financial planning and budgets. The Tribe’s Judicial Branch consists of a District Court and Court of Appeals.<sup>1</sup> The Tribe’s application contains an organizational chart showing the branches of government and their respective areas of responsibility.<sup>2</sup>
- The Tribe is a constituent member of the Minnesota Chippewa Tribe (MCT), a coalition of six tribes which, in 1936, together formed a centralized Tribal Executive Committee to carry out certain federated governmental functions, while each member tribe’s Reservation Business Committee handled governmental functions specific to each member band.<sup>3</sup>
- Since 1997, MCT has divested its centralized authority to the individual member bands for their respective and, in certain cases concurrent with MCT, management of reservation lands and resources, including the authority to “manage, lease, permit, or otherwise deal with tribal lands within the Band’s jurisdiction.”<sup>4</sup> This authority includes individual Band jurisdiction over, among other things, leaseholds and assignments, including of MCT lands within individual member’s reservations;<sup>5</sup> and the disposition and management of MCT lands held for forestry and subsistence camps;<sup>6</sup> and includes the ability to condemn MCT lands if appropriate.<sup>7</sup> In sum, the member bands possess necessary authority for both those trust lands held by each member band as well as those

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<sup>1</sup> Letter from Bradley Kalk, MCT Commissioner of Natural Resources, to Susan Hedman, Regional Administrator, July 6, 2011, enclosing the Tribe’s application for an eligibility determination under the TAR for Section 105 program grant funding at a reduced match and treatment as an “affected state” under Clean Air Act Section 505(a)(2), [“Application”] at 7-8.

<sup>2</sup> Application at 6.

<sup>3</sup> Letter from Todd R. Matha, Mille Lacs Band Solicitor General, to Susan Hedman, February 10, 2012, at 1.

<sup>4</sup> Minnesota Chippewa Tribe Land Ordinance #3, §§ 102 and 302 (October 22, 1997).

<sup>5</sup> Minnesota Chippewa Tribe Land Ordinance #3, §§ 301 and 401

<sup>6</sup> Minnesota Chippewa Tribe Land Ordinance #3, § 503

<sup>7</sup> Minnesota Chippewa Tribe Land Ordinance #3, § 504.

MCT lands that fall within the boundaries of individual member bands' respective reservations.<sup>8</sup>

- The application adequately describes the organizational structure of the tribal government, responsibilities of the tribal organizations, and the governmental functions carried out in the exercise of police powers affecting the health, safety, and welfare of the Reservation; and, the exercise of authorities over land use planning and management, including regulation of sale, disposition, and lease of property and tribal assets.

For the reasons discussed above, we conclude that the application adequately demonstrates that the Mille Lacs Band has a governing body carrying out substantial governmental duties and functions, including the protection of public health and the environment which are entirely consistent with the scope of the CAA authorities the Tribe now seeks.

**3. The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction (40 C.F.R. 49.7(3))**

The Tribe's application includes maps of the area over which it intends to assert authority for the purpose of air quality management, a list of trust lands included in the application, and a certification that all trust lands are under the jurisdiction of the Band.<sup>9</sup> These trust lands are located in Pine, Aitkin, Crow Wing, and Mille Lacs counties.<sup>10</sup>

Additionally, the Tribe has already sought and obtained TAS eligibility to carry out activities under the Clean Water Act within the exterior boundaries of the Reservation pursuant to the Section 106 grant program.

Finally, the Tribe's application also includes a statement from its legal counsel that outlines the basis for its assertion of authority to carry out the functions sought in this application.<sup>11</sup>

The Tribe's application includes a description of its jurisdiction and a detailed map and list of trust parcels, which together adequately describes the area within which the Tribe seeks authority. As discussed below, the application, including the map and boundary information submitted by the Tribe, was available for review by the State of Minnesota and members of the public. The Region did not receive any comments challenging the geographic scope of the Tribe's application.

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<sup>8</sup> Minnesota Chippewa Tribe Land Ordinance #3, §§ 102 and 302.

<sup>9</sup> Application, Exhibits A and B; Lisa Ann Johnson, Director of Real Estate, Mille Lacs Band of Ojibwe, Certification of Trust Lands under the Jurisdiction of the Mille Lacs Band, July 1, 2011. The Tribe is not seeking CAA grant eligibility for all lands within its 1855 reservation area at this time. Nothing in this decision document is intended to preclude any future assertion of such jurisdiction by the Tribe.

<sup>10</sup> Application, Exhibits A and B.

<sup>11</sup> Letter from Todd R. Matha, Mille Lacs Band Solicitor General, to Susan Hedman, February 10, 2012.

The Tribe's application appropriately identifies the area within which the Tribe seeks delegated authority.

**4. The Indian Tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CAA and all applicable regulations (40 C.F.R. 49.7(4))**

The application is seeking approval under two provisions of the CAA, each of which are evaluated separately below.

- Section 105: The Tribe's Department of Natural Resources and Environment (DNRE) has an exceptional history of effectively managing environmental programs and grants provided by EPA. Beginning in 1997, the Tribe effectively utilized its General Assistance Program grant funds to build capacity towards developing an Air Program and securing dedicated CAA grant funding. In 2001, the Tribe secured CAA Section 103 grant funds for projects targeting ambient air monitoring for CO, PM 10, PM 2.5, mercury deposition, and ozone; as well as completion of an emissions inventory; and projects relating to clean energy/alternative energy and energy efficiency and indoor air quality. The Tribe's DNRE has also secured funding under the Seven Generations Initiative for additional indoor air quality and energy efficiency studies, and has successfully managed other media program grants embodied in a performance partnership grant with EPA, as well as a direct implementation tribal cooperative agreement with the Agency. The Band was able to hire a full-time Air Quality Technician (AQT) position in 2001 and its Air Quality Program has successfully completed the above-mentioned projects by maintaining this full-time position since its inception. The Band's DNRE has successfully managed a CAA Section 103 grant totaling \$100,000 annually since fiscal year 2014 and has consistently delivered positive environmental results.<sup>12</sup>

Section 505(a)(2): The Band submitted extensive information in its TAR application highlighting its training and experience in the field of air quality management, including the full-time AQT's curriculum vitae, further demonstrating its expertise in evaluating air quality issues. The Band's AQT and DNRE are capable of evaluating and commenting on air permit applications for facilities located in Minnesota where the air emissions may affect Reservation air quality, and/or commented on other Tribal and Federal permits issued within 50 miles of the Reservation. The Band's staff have completed numerous air-related technical and programmatic trainings through Northern Arizona University's Institute for Tribal Environmental Professionals. Relevant courses completed to date include "The CAA and Permitting," "Title V Permit Review," and "Management of

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<sup>12</sup> Application at 8-12.

### Tribal Air Programs and Grants.”<sup>13</sup>

The application states that the Tribe’s AQT and DNRE staff have significant educational and work-related experience that provides the capability, from both a technical and administrative perspective, to effectively manage air quality programs, including the use of Section 105 grants, and affected state status.

The Air and Radiation Division and Tribal and International Affairs Office have evaluated the Tribe’s capability. Based on this evaluation, we conclude that the Tribe has demonstrated that it meets the requirements for eligibility, including capability for administering Sections 105 and 505(a)(2) of the CAA.

### **State and Public Review**

EPA regulations provide that upon determining that the application is complete, the Regional Administrator has thirty days to notify all appropriate governmental entities of the Tribe’s application, including specifying the Tribe’s description of the geographic boundaries of the reservation. Appropriate governmental entities are any state, federal, or tribal governments located immediately adjacent to the Tribe’s Reservation. In this instance, the State of Minnesota has lands adjacent to the Mille Lacs Band’s Reservation and was therefore notified of the Tribe’s application. The State was provided with notification of the Tribe’s complete application with supporting documentation and maps of the Reservation boundaries by letter dated September 8, 2015.

EPA also published newspaper notices in the *Minneapolis Star-Tribune* on September 13, 2015 and the *Brainerd Dispatch* on September 14, 2015, inviting local governments and citizens wishing to comment on the boundaries of the Tribe’s Reservation to submit relevant information either to the State or directly to EPA. The comment period for the State and local governments and citizens expired on October 15, 2015.

The Minnesota Pollution Control Agency (MPCA) provided comments to EPA on October 13, 2015. No adverse comments were received from the State of Minnesota or MPCA. The MPCA’s comment letter indicated support for the Band’s TAR submittal and suggested that EPA seek verification from the Department of Interior regarding the status of trust parcels included in the application. EPA’s regulations provide that affected governmental entities

. . . [S]hall have 30 days to provide written comments to EPA’s Regional Administrator regarding any dispute concerning the boundary of the reservation. . . . In all cases, comments must be timely, limited to the scope of the tribe’s jurisdictional assertion, and

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<sup>13</sup> Application at 8-12; [undated, but February 2012] Letter from Bradley Kalk, to Susan Hedman, enclosing February 10, 2012 letter from Todd R. Matha, Mille Lacs Band Solicitor General, to Susan Hedman, and Mille Lacs Band of Ojibwe Indians CAA § 103 Air Project Grant, April 1, 2012 – March 31, 2013; Application at Attachment B1, Curriculum vitae of Charles J. Lippert.

clearly explain the substance, bases and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.<sup>14</sup>

As noted in the Eligibility Section 3 above, the Tribe provided a list of specific parcels and their township and range data, maps, and a certification by an appropriate governmental official that these trust lands are located within the jurisdiction of the Tribe. The State has raised no competing claim of jurisdiction nor identified any deficiency in the information provided by the Tribe. Absent such a claim, EPA does not find a sufficient basis to request information from the Department of Interior. Therefore, we find the Tribe had adequately demonstrated "the area over which the application asserts authority."<sup>15</sup>

EPA received two comment letters from Mille Lacs County which asserted: 1) the Mille Lacs Band is not a federally recognized tribe; 2) the Tribe failed to show that it has authority over lands held in trust for the Minnesota Chippewa Tribe; and 3) Minnesota has CAA jurisdiction for all lands within the state borders.<sup>16</sup> These comments are mistaken as discussed below.

The Mille Lacs Band, as explained above, is a federally recognized tribe which appears on the U.S. Department of Interior's annual list of federally recognized tribes. Additionally, in response to the comment, the Mille Lacs Band provided an exhaustive survey of the multiple additional sources of evidence for its federal recognition, of which we note only two. First, as discussed in Section 2 above, the six constituent Chippewa tribes together formed the federated structure of the Minnesota Chippewa Tribal consortium in 1936, imbuing MCT with the inherent authority belonging to the individual member bands.<sup>17</sup>

Second, the Minnesota federal district court expressly found that the Mille Lacs Band is a federally recognized tribe in its decision affirming the continuing usufructory rights of the Mille Lacs and other Chippewa Bands under their treaty of 1837, and as affirmed by the Supreme Court in its 1999 decision *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>18</sup> As an additional note, Mille Lacs County itself has taken the position that the Mille Lacs Band is federally recognized in several instances, including a recent Mille Lacs County Attorney's Office opinion and in litigation before the Minnesota Supreme Court.<sup>19</sup>

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<sup>14</sup> 40 C.F.R. §§ 49.9(c)-(d).

<sup>15</sup> 40 C.F.R. § 49.9(7)(a)(3)(i).

<sup>16</sup> Letter from Randy V. Thompson, Nolan, Thompson & Leighton, PLC, to Diane Nelson, EPA, October 13, 2015 [hereafter Nolan Letter I] and Letter from Randy V. Thompson to Diane Nelson, November 19, 2015 [hereafter Nolan Letter II].

<sup>17</sup> "Evidence that the Mille Lacs Band is a Federally Recognized Tribe," Memorandum from Marc Slonim and Beth Baldwin, Ziontz Chestnut, to Barbara Wester, February 11, 2016, at 7 [hereafter "Slonim Baldwin Memorandum"].

<sup>18</sup> *Mille Lacs Band v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8<sup>th</sup> Cir. 1997), *aff'd sub. Nom Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999). Slonim Baldwin Memorandum at 11, noting that the County was a party to this case and is bound by the Court's decision.

<sup>19</sup> Joe Walsh, Mille Lacs County Attorney, "Mille Lacs County Attorney's Office Opinion on Tribal Law Enforcement Agencies sharing Peace Officers with other Tribal Law Enforcement Agencies," August 10, 2015 [signed August 19, 2015]; Slonim Baldwin Memorandum at 12.



Additionally, the County argues that the Tribe has not demonstrated its authority over those trust lands held by the Minnesota Chippewa Tribe.<sup>20</sup> As explained in Section 3 above, since 1997, MCT has divested its centralized authority to the individual member bands for their respective and, in certain cases concurrent with MCT, management of reservation lands and resources, including the authority to “manage, lease, permit, or otherwise deal with tribal lands within the Band’s jurisdiction.”<sup>21</sup> The broad scope of this agreement ensures that each member band has authority for both those trust lands held by each member band as well as those MCT lands that fall within the boundaries of individual member bands’ respective reservations.<sup>22</sup> While, as previously noted, the Tribe’s application includes a certification that the Tribe holds jurisdiction over all lands included in the application, including those held by MCT,<sup>23</sup> the Tribe additionally provided MCT Resolution 29-16 which confirms the authority of the Tribe, under Land Ordinance #3, to exercise authorities sought in its TAR/TAS application and confirms the support of the Consortium for the Tribe’s TAR/TAS application.<sup>24</sup>

Finally, the County argues that the Band is precluded from obtaining any authority under the CAA because the State of Minnesota “has regulatory jurisdiction under the Clean Air Act over all lands within its territory.”<sup>25</sup> In support of this position, the County cites *Oklahoma Department of Environmental Quality v. Environmental Protection Agency*, for the proposition that tribes must demonstrate authority to assert jurisdiction in areas of non-reservation Indian country,<sup>26</sup> and cites Public Law 280 for the proposition that the State has assumed regulatory jurisdiction over the Tribe for CAA purposes by virtue of this statute.<sup>27</sup> These arguments are mistaken for the reasons explained below.

First, the Tribe’s application is comprised entirely of trust lands held by the Tribe or MCT. In its challenge to EPA’s Indian Country New Source Review Rules, which were at issue in the *Oklahoma Department of Environmental Quality* case cited by the County, Oklahoma did not

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<sup>20</sup> Nolan I, at 2; in Nolan II, the County additionally argues that the MCT Revised Constitution provides for individual enrollment in the MCT tribe, citing MCT Revised Constitution, Art. II (Nolan II, at 2). The Revised Constitution, however, provides more than this, namely, that MCT members must also be enrolled members of their respective Band. MCT Revised Constitution at Art. IV. See also, Slonim Baldwin Memorandum at 2-3, citing numerous additional authorities not enumerated here.

<sup>21</sup> Minnesota Chippewa Tribe Land Ordinance, #3, §§ 102 and 302.

<sup>22</sup> Minnesota Chippewa Tribe Land Ordinance, #3, §§ 102 and 302.

<sup>23</sup> Certification of Trust Lands under the Jurisdiction of the Mille Lacs Band.

The County appears to argue (Nolan I, at 2) that without an express grant in MCT Land Ordinance #3 over air resources to each member band, the member bands may not exercise such authority. As discussed above, the Ordinance recognizes the primacy of individual member bands over their respective reservation lands, and the County provides no basis for establishing how the regulation of air quality for such lands can be considered separately from protection and regulation of the lands themselves (and which the County argues must belong to the State for air quality related to the lands within the state’s borders).

<sup>24</sup> MCT Resolution 29-16 (January 14, 2016), enclosed with Slonim Baldwin Memorandum.

<sup>25</sup> Nolan I, at 2-3

<sup>26</sup> Nolan I, at 2-3; Nolan II, at 2.

<sup>27</sup> Nolan I, at 2.

challenge a tribe's ability to assert jurisdiction over either formal or informal reservation lands.<sup>28</sup> Rather, Oklahoma challenged only EPA's position regarding "non-reservation Indian country," which is limited to individual allotments and dependent Indian communities.<sup>29</sup> No non-reservation Indian country lands are at issue in the Mille Lacs Band's application for CAA authority and therefore this case is not relevant to the application before EPA today.

Second, although the Tribe is not seeking regulatory authority in its application before EPA, the County argues, with no authority other than a citation to the statute it cites, and that the State has jurisdiction over the Tribe by virtue of Minnesota being "a Public Law 280 State."<sup>30</sup> Public Law 280 was designed to convey jurisdiction over certain criminal and civil matters to certain states during the "Termination" period of U.S. Indian policies.<sup>31</sup> The Statute generally does not apply to regulatory jurisdiction.<sup>32</sup> In 1990, Congress amended the CAA to authorize EPA to treat Indian tribes as states.<sup>33</sup> In its preamble to the 1998 final rule implementing tribal CAA authorities, EPA noted in response to a comment that while some states exercise statutory jurisdiction over non-Indian fee lands located on reservations, "EPA believes that the CAA delegation of authority to eligible tribes over reservations represents a more recent expression of Congressional intent and will generally supersede other federal statutes."<sup>34</sup> In reaching our decision today we need not resolve any alleged conflict between Public Law 280 and the CAA because the Tribe in this application is not seeking regulatory authority under the CAA. Therefore, Public Law 280 is not relevant to consideration of the Tribe's application.<sup>35</sup>

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<sup>28</sup> 740 F.3d 185, 189: "Oklahoma petitions for review of the Indian Country NSR Rule 'only as it pertains to non-reservation 'Indian country' lands, including allotments and dependent Indian communities.' Oklahoma does not challenge the rule as it pertains to reservations, whether formal or informal."

<sup>29</sup> 740 F.3d 185, 188:

In 1998 the EPA interpreted the geographic reach of the tribal jurisdiction created in 1990 to track the definition of "Indian country" in the federal criminal code [citations omitted]. . . More specifically, the EPA interpreted the term "reservation" in § 7601(d)(2)(B) to include formal reservations, Pueblos, and tribal trust lands, the latter two categories being essentially informal reservations [citations omitted]; it interpreted the phrase "other areas within the tribe's jurisdiction" to include "all non-reservation areas of Indian country," [citations omitted]. . . i.e., the "dependent Indian communities" and "Indian allotments" referenced in 18 U.S.C. § 1151(b)-(c).

<sup>30</sup> Nolan I, at 2.

<sup>31</sup> Cohen, *Handbook of Federal Indian Law*, § 6.04[3].

<sup>32</sup> See Cohen at § 6.04[3][b][ii], citing, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>33</sup> 42 U.S.C. 7601(d). See also *Oklahoma Department of Environmental Quality*, at 187-188:

In 1990 the Congress amended the [Clean Air] Act to authorize the EPA "to treat Indian tribes as states," § 7601(d)(1)(A), subject to the condition that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction. . . .

<sup>34</sup> U.S. EPA, "Indian Tribes: Air Quality Planning and Management; Final Rule," 63 *Fed. Reg.* 7254, 7256 (February 12, 1998).

<sup>35</sup> As a final claim of an argument for unitary state authority within Minnesota's borders, the County argues that the Tribe's application, consisting as it does of disparate trust parcels, will impose burdensome notification requirements on the State pursuant to carrying out the notification for contiguous affected states under CAA § 505(a)(2). Neither the CAA nor the implementing regulations make any exception to eligibility for seeking authority on the basis that a State or Tribe has non-contiguous land holdings, nor does this argument fall within the scope of affected state comments under 40 C.F.R. § 49.9, which limit such comments to assertions of geographic boundaries. 40 C.F.R. § 49.9(b).

## **Conclusion**

For the reasons stated above, we recommend that you concur on the finding that the Tribe is eligible for treatment in the same manner as a state for the two CAA programs included in its TAR application. Attached is the index of documents that comprise the administrative docket upon which this decision document is based.

**Mille Lacs Band of Ojibwe Application for CAA Sections 105 and 505(a)(2) under the  
Clean Air Act Tribal Authority Rule**

**DOCKET AND ADMINISTRATIVE RECORD FOR REGIONAL ADMINISTRATOR  
CONCURRENCE PACKAGE**

1. July 12, 2011, submittal from Bradley Kalk, Mille Lacs Band Commissioner of Natural Resources to Susan Hedman, Regional Administrator, enclosing the Band's application for an eligibility determination under the TAR for Section 105 program grant funding at a reduced match and treatment as an "affected state" under Clean Air Act Section 505(a)(2).
2. [undated, but February 2012] Letter from Bradley Kalk, to Susan Hedman, enclosing (1) February 10, 2012 letter from Todd R. Matha, MLB solicitor General, to Susan Hedman, and (2) Mille Lacs Band of Ojibwe Indians CAA § 103 Air Project Grant, April 1, 2012 – March 31, 2013.
3. July 15, 2015, Benjamin Giwojna and Barbara L. Wester, Final Checklist for Tribal Eligibility Determinations for Clean Air Act Grants and Programs for use by the Air and Radiation Division and Office of Regional Counsel for the Mille Lacs Band of Ojibwe TAR Application Evaluation.
4. Joe Walsh, Mille Lacs County Attorney, "Mille Lacs County Attorney's Office Opinion on Tribal Law Enforcement Agencies sharing Peace officers with other Tribal Law Enforcement Agencies," August 10, 2015 [signed August 19, 2015], enclosed in email from Marc Slonim, Ziontz Chestnut, to Barbara Wester, EPA, "Mille Lacs Band," July 5, 2016.
5. September 15, 2015, Region 5 EPA Program Reviews/Capacity Statements for Mille Lacs Band of Ojibwe.
6. September 8, 2015, Memorandum from George T. Czerniak, Bertram C. Frey, and Casey Ambutas, to Susan Hedman [Recommendation to find Mille Lac's Band of Ojibwe's TAR application complete and send to the states and other appropriate governmental entities for 30-day review and comment].
7. September 8, 2015, Letters from Susan Hedman, Regional Administrator, to John Linc Stine, Commissioner of Minnesota Pollution Control Agency and Melanie Benjamin, Chief Executive of Mille Lacs Band of Ojibwe, notifying Minnesota as the appropriate governmental entity and the Band of EPA's completeness determination and the start of the 30-day comment period on the Band's complete, final TAR application.
8. September 13, 2015, newspaper notice published in the *Minneapolis Star-Tribune* notifying the public of the Mille Lacs Band of Ojibwe's final TAR application and opportunity to review and comment within 30 days.
9. September 14, 2015, newspaper notice published in the *Brainerd Dispatch* notifying the public of the Mille Lacs Band of Ojibwe's final TAR application and opportunity to review and

comment within 30 days.

10. October 13, 2015, letter from John Linc Stine, Commissioner of Minnesota Pollution Control Agency, to Susan Hedman, Regional Administrator regarding State of Minnesota's comments of the Mille Lacs Band's TAR application package.

11. October 13, 2015, letter from Randy V. Thompson of Nolan, Thompson, and Leighton, PLC transmitting Mille Lacs County's preliminary comments on the Mille Lacs Band's TAR application package and requesting a 30-day extension to the comment period.

12. October 22, 2015, email from Barbara Wester to Randy V. Thompson granting the county's request for a 30-day extension to the comment period.

13. November 20, 2015, letter from Randy V. Thompson of Nolan, Thompson, and Leighton, PLC reiterating Mille Lacs County's comments on the Mille Lacs Band's TAR application package.

14. February 11, 2016, Memorandum and compilation of documents included on compact disc from Marc Slonim and Beth Baldwin, Ziontz Chestnut, to Barbara Wester "Evidence that the Mille Lacs Band is a Federally Recognized Tribe."

15. June 14, 2016, email from Marc Slonim to Barbara Wester, "Re: responding to vm messages," responding to email from Barbara Wester to Marc Slonim, June 9, 2016.

16. December 1, 2016, Letter from Robert A. Kaplan, Regional Administrator-EPA Region 5, to Melanie Benjamin, Chief Executive of the Mille Lacs Band of Ojibwe, regarding approval of the Band's application for TAS status for Sections 105 and 505(a)(2) of the CAA under the TAR.

17. December 1, 2016, Letter from Robert A. Kaplan, Regional Administrator-EPA Region 5, to Randy V. Thompson of Nolan, Thompson, and Leighton, PLC, enclosing "U.S. Environmental Protection Agency's Response to Comments Mille Lacs Band of Ojibwe's Application for eligibility for Two Programs Under the Clean Air Act Tribal Authority Rule (TAR)," November 23, 2016.

18. December 7, 2016, Memorandum from Edward Nam, T. Leverett Nelson, and Anthony Greenwater, to Robert A. Kaplan [Recommendation to approve the Mille Lacs Band of Ojibwe's application for TAS for Sections 105 and 505(a)(2) of the CAA under the TAR], enclosing "Support document for the approval of the Mille Lacs Band of Ojibwe's Request for eligibility for Two Clean Air Act Programs under the Tribal Authority Rule Prepared by the Air and Radiation division, Office of Regional Counsel, and Tribal and International Affairs Office," November 23, 2016.